

OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF COLUMBIA

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

Pursuant to the authority set forth in section 861 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, as added by the Legal Service Establishment Amendment Act of 1998 ("Legal Service Act"), effective April 20, 1999, D.C. Law 12-260, and as amended by the Legal Service Amendment Act of 2005 ("Legal Service Amendment Act"), effective October 20, 2005, Title III(B) of D.C. Law 16-33, D.C. Official Code § 1-608.61 (2001), the Attorney General hereby gives notice of his adoption, on an emergency basis, of the following amendments to Chapter 36 of the District of Columbia Personnel Regulations, pertaining to the Legal Service.

Emergency action to adopt these rules is necessary because management for the Office of the Attorney General for the District of Columbia ("OAG") and the American Federation of Government Employees Local 1403, which represents most line attorneys employed by OAG, have agreed to new performance evaluation rating criteria that are to be used for the 2008-2009 line attorney rating period, which ends on August 31, 2009. In particular, these rules replace the existing five rating categories, *i.e.*, "outstanding," "excellent," "satisfactory," "marginal," and "unsatisfactory," with the five rating categories, "outstanding," "excellent," "successful," "needs improvement," and "fails expectations." These rules also redefine the categories carried over ("outstanding" and "excellent") and define the new categories added ("successful," "needs improvement," and "fails expectations"). These new rating categories must be in place so that line attorneys can be timely rated as soon as the 2008-2009 rating period ends on August 31, 2009.

In addition, OAG management plans to discontinue use of the District-wide Performance Management Program ("PMP") administered by the D.C. Department of Human Resources for evaluating the performance of supervisory attorneys and certain high-level non-supervisory attorneys and to adopt a new in-house performance evaluation system for these attorneys that replaces the existing five rating categories with four rating categories, *i.e.*, "Outstanding," "Successful," "Needs Improvement," and "Fails Expectations.." These rules define these categories, which are to be used for the 2008-2009 rating period and need to be in place so these attorneys can be timely rated as soon as their 2008-2009 rating period ends on September 30, 2009.

Finally, the new rating systems for line attorneys, supervisory attorneys, and high-level non-supervisory attorneys will be accompanied by revised evaluation forms that better ensure accuracy and consistency.

These emergency rules were adopted on August 31, 2009 and will remain effective for 120 days, or until publication of the final rules in the D.C. Register, whichever occurs first. The Attorney General hereby gives notice of his intent to take final rulemaking action to adopt these proposed rules (which are identical to the emergency rules) in not less than 30 days from the date of publication of this notice in the D.C. Register.

Chapter 36 of the D.C. Personnel Regulations is amended as follows:

Subsection 3602.4 is amended to read as follows:

3602.4 An attorney may receive a within-grade step increase only if he or she received a rating of “successful,” “excellent,” or “outstanding” for the rating period immediately prior to the due date for a within-grade step increase. Failure to achieve the required rating shall result in the due date for the step increase being delayed for an additional year.

Subsection 3604.5 is amended to read as follows:

3604.5 Beginning with the 2008-2009 rating period, the evaluation of performance of supervisors and the non-supervisory attorneys described in sections 3606 and 3607 shall no longer be under the District government’s Performance Management Program (“PMP”), but instead shall be under the in-house performance evaluation system described in these rules.

Subsection 3604.7 is amended to read as follows:

3604.6 Any supervisor or non-supervisory attorney as described in sections 3606 and 3607 who is reinstated, restored, newly appointed, or transferred shall automatically be considered as having been assigned a rating of “successful,” which shall remain the official rating of record until such time as replaced by another official rating.

Subsection 3604.8 is amended to read as follows:

3604.8 For line attorneys and non-supervisory attorneys described in sections 3605 and 3607 starting with the 2008-2009 rating period, each written evaluation shall assign an overall rating to the attorney of “outstanding,” “excellent,” “successful,” “needs improvement,” or “fails expectations.” For all attorneys covered by these rules other than line attorneys and non-supervisory attorneys described in sections 3605 and 3607 starting with the 2008-2009 rating period, each written evaluation shall assign an overall rating to the attorney of “outstanding,” “successful,” “needs improvement,” or “fails expectations.”

Subsection 3605.16 is amended to read as follows:

3605.16 Each supervisor shall perform at least one interim evaluation of every attorney under his or her supervision annually, in the ninth month of the rating period. An interim evaluation shall consist of an informal meeting to discuss the line attorney’s performance under his or her Individual Accountability Plan. At his or her discretion, a supervisor may provide a written interim evaluation. Any written interim evaluation shall be provided to the attorney evaluated, but shall not be included in the attorney’s official personnel file unless the supervisor rates the attorney as “needs

improvement” or lower. At his or her discretion, or at the request of the Attorney General, a supervisor may perform interim evaluations no more frequently than once every three (3) months during the rating period. Interim evaluations rating a line attorney as “needs improvement” or lower may be changed by mutual agreement or by the filing of an appeal as provided in this section.

Subsection 3609.1 is amended to read as follows:

3609.1 Beginning with the 2000-2001 rating period, each attorney, other than attorneys in Senior Executive Attorney Service positions, assigned an overall rating of “needs improvement” in an annual or interim evaluation shall be provided with a Performance Improvement Plan, on a form approved by the Attorney General for the District of Columbia, that identifies specific areas where improvement is needed in performing his or her work in a manner that meets the expectations of an attorney in that grade. Beginning with the 2008-2009 rating period, each line attorney who receives either a “needs improvement” rating in any performance element or overall or a “fails expectations” rating in any performance element shall be provided with such a Performance Improvement Plan. Beginning with the 2008-2009 rating period, each line attorney who receives a “fails expectations” rating overall shall be provided with an advance written notice of proposed removal under section 3614 of this Chapter.

Section 3699 is amended to read as follows:

3699 DEFINITIONS

3699.1 In this Chapter, the following terms shall have the following meanings:

Act – The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139, as amended by the Legal Service Establishment Amendment Act of 1998, effective April 20, 1999, D.C. Law 12-260, D.C. Official Code § 1-601.01 *et seq.* (2001), and as amended by both the Technical Amendments Act of 1999, effective April 12, 2000, D.C. Law 13-91, and the Legal Service Amendment Act of 2005, effective October 20, 2005, D.C. Law 16-33, and as amended by any subsequent laws.

Administrative hearing officer – A person whose duties, in whole or in substantial part, consist of conducting or presiding over hearings in contested matters pursuant to law or regulation, or who is engaged primarily in adjudicatory functions on behalf of an agency, rather than investigative, prosecutorial or advisory functions, including, but not limited to any person who bears the title Hearing Officer, Hearing Examiner, Attorney Examiner, Administrative Law Judge, Administrative Judge, or Adjudication Specialist.

Administrative law judge – A person whose duties, in whole or in substantial part, consist of conducting or presiding over hearings in contested matters pursuant to law or regulation, or who is engaged primarily in adjudicatory functions on behalf of an agency, rather than investigative, prosecutorial or advisory functions, including, but not limited to any person who bears the title

Hearing Officer, Hearing Examiner, Attorney Examiner, Administrative Law Judge, Administrative Judge, or Adjudication Specialist.

Attorney – Any position that is classified as part of Series 905, except for any position that is occupied by a person whose duties, in whole or in substantial part, consist of hearing cases as an administrative law judge or an administrative hearing officer.

Attorney General for the District of Columbia – The chief legal officer of the District Government, appointed by the Mayor to head the Office of the Attorney General for the District of Columbia and to conduct all law business of the District Government.

Calendar year – The period of time beginning with the first full pay period in January through the beginning of the first full pay period in January of the following year as determined by the Office of Personnel.

Chain of command – The order of authority of positions within the Office of the Attorney General for the District of Columbia and the offices of the General Counsels for non-delegated subordinate agencies, as set forth by Office Order of the Attorney General for the District of Columbia.

Chief Deputy – An official, designated by the Attorney General for the District of Columbia, who is the highest-ranking official in the chain of command in the Office of the Attorney General for the District of Columbia other than the Attorney General.

Competencies – Behaviors demonstrated on the job by supervisors described in sections 3606 and 3607 of these rules as follows: Program Management; Staff Supervision; Performance Management; Work Productivity; Communication; Customer Service; and Regulations Adherence. These behaviors shall have the meaning established by the Attorney General for the District of Columbia.

Days – Calendar days.

Delegated subordinate agency – A subordinate agency for which the Attorney General for the District of Columbia has delegated the direction, supervision, and control of attorneys to the Agency Head.

Equivalent position – Any attorney position at any grade in which the attorney performs work or has responsibilities that the Attorney General for the District of Columbia determines are substantially similar to the work or responsibilities of any Legal Service position that is classified at LX-2 or above.

Excellent (line attorneys and non-supervisory attorneys under sections 3605 and 3607 of these rules only starting with the 2008-2009 rating period) – Performance is clearly above the generally expected performance level for attorneys of comparable experience. Quality of work is consistently very good. The attorney's development is progressing rapidly and continued growth is anticipated. An attorney will receive an overall rating of "excellent" when 75% or more of

weighted categories fall within the “excellent” level without a “fails expectations” or “needs improvement” rating in any element.

Fails expectations (line attorneys and non-supervisory attorneys under sections 3605 and 3607 of these rules only starting with the 2008-2009 rating period) – Performance is significantly below the generally expected performance level for attorneys of comparable experience. Considerable weaknesses exist in substantive or other areas. An attorney will receive an overall rating of “fails expectations” when 15% or more of weighted categories fall within the “fails expectations” level.

Fails expectations (supervisors under section 3606 of these rules only starting with the 2008-2009 rating period) – Performance is significantly below the generally expected performance level of supervisors of comparable experience. There are considerable weaknesses in substantive or other areas. One (1) point is awarded to each competency starting with the 2008-2009 rating period rated as “fails expectations” and to both each competency and each S.M.A.R.T. goal starting with the 2009-2010 rating period rated as “fails expectations.” The overall rating of “fails expectations” for the 2008-2009 rating period results from application of the formula, Overall Performance Rating = Sum of all Competency Ratings (each competency weighed equally)/Number of Competencies, where the total figure derived on the right side of this formula is in the range “1.0-1.7”. The overall rating of “fails expectations” starting with the 2009-2010 rating period results from application of the formula, Overall Performance Rating = (Sum of all Competency Ratings/Number of Competencies x .4) + (Sum of all S.M.A.R.T. Goal Ratings/Number of S.M.A.R.T. Goals x .6), where the total figure derived on the right side of this formula is in the range “1.0-1.7”.

Legal Service – The service established pursuant to Title VIII-B of the Act, to include every attorney employed by the Office of the Attorney General for the District of Columbia or a subordinate agency in a Series 905 position.

Line attorney – Any attorney who is not a supervisor, excluding attorneys who report directly to the Attorney General for the District of Columbia or the Chief Deputy Attorney General.

Needs improvement (line attorneys and non-supervisory attorneys under sections 3605 and 3607 of these rules only starting with the 2008-2009 rating period) – Performance is below the generally expected performance level for attorneys of comparable experience and requires more supervision and follow-up than is expected. Quality of work is inconsistent and/or improvement is necessary in substantive or other areas. An attorney will receive an overall “needs improvement” rating when 15% or more of weighted categories fall within the “needs improvement” level.

Needs improvement (supervisors only under section 3606 of these rules starting with the 2008-2009 rating period) – Performance is below the generally expected performance level for supervisors of comparable experience and requires more follow-up than is expected. Quality of work is inconsistent and/or improvement is necessary in substantive or other areas. Two (2) points are awarded to each competency starting with the 2008-2009 rating period rated as “needs improvement” and to both each competency and each S.M.A.R.T. goal starting with the 2009-

2010 rating period rated as “needs improvement.” The overall rating of “needs improvement” for the 2008-2009 rating period results from application of the formula, Overall Performance Rating = Sum of all Competency Ratings (each competency weighed equally)/Number of Competencies, where the total figure derived on the right side of this formula is in the range “1.8-2.8”. The overall rating of “needs improvement” starting with the 2009-2010 rating period results from application of the formula, Overall Performance Rating = (Sum of all Competency Ratings/Number of Competencies x .4) + (Sum of all S.M.A.R.T. Goal Ratings/Number of S.M.A.R.T. Goals x .6), where the total figure derived on the right side of this formula is in the range “1.8-2.8”.

Non-delegated subordinate agency – A subordinate agency over which the Attorney General for the District of Columbia retains control under section 855 of the Act.

Outstanding (line attorneys and non-supervisory attorneys under sections 3605 and 3607 of these rules only starting with the 2008-2009 rating period) – Performance consistently exceeds highest expectations by a wide margin. This rating is reserved for truly exceptional individuals who are significantly above the generally expected performance level for attorneys of comparable experience. An attorney will receive an overall “outstanding” rating when 80% or more of the weighted categories fall within the “outstanding” level.

Outstanding (supervisors under section 3606 of these rules only starting with the 2008-2009 rating period) – Performance consistently exceeds highest expectations by a wide margin. This rating is reserved for truly exceptional individuals who are significantly above the generally expected performance level for supervisors of comparable experience. Four (4) points are awarded to each competency starting with the 2008-2009 rating period rating as “outstanding” and to both each competency and each S.M.A.R.T. goal starting with the 2009-2010 rating period rated as “outstanding.” The overall rating of “outstanding” for the 2008-2009 rating period results from application of the formula, Overall Performance Rating = Sum of all Competency Ratings (each competency weighed equally)/Number of Competencies, where the total figure derived on the right side of this formula is in the range “3.6-4.0”. The overall rating of “outstanding” starting with the 2009-2010 rating period results from application of the formula, Overall Performance Rating = (Sum of all Competency Ratings/Number of Competencies x .4) + (Sum of all S.M.A.R.T. Goal Ratings/Number of S.M.A.R.T. Goals x .6), where the total figure derived on the right side of this formula is in the range “3.6-4.0”.

Performance Management Program (PMP) – The systematic process by which an agency involves its employees, as individuals and members of a group, in improving performance in the accomplishment of agency mission and goals, as set out in Chapter 14 of the District of Columbia Personnel Regulations, which was in effect for attorney-supervisors and non-supervisory attorneys under sections 3606 and 3607 of these rules for the 2002-2003 through the 2007-2008 rating periods.

Rating period – September 1st to August 31st for line attorneys under section 3605 of these rules and October 1st to September 30th for all other attorneys covered by these rules.

Senior Executive Attorney Service position – (A) Any attorney position that is classified above LA-15 or LX-1, or an equivalent position, and in which the employee: (i) directs the work of an organizational unit; (ii) is held accountable for the success of one or more specific programs or projects; (iii) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to these goals; (iv) supervises the work of employees other than personal assistants; (v) performs important legal policy-making or policy-determining functions; or (vi) provides significant leadership in legal counseling or in the trial of cases; or (B) Any attorney who is a Chief Deputy Attorney General, Deputy Attorney General, Special Deputy Attorney General, Senior Counsel to the Attorney General, Special Counsel to the Attorney General, any other attorney in the Office of the Attorney General for the District of Columbia who routinely reports directly to the Attorney General; or (C) Any attorney who is a General Counsel employed by a subordinate agency.

S.M.A.R.T. goals – Specific, measurable, attainable, realistic, and time-related goals that are established annually for a supervisory or other non-line attorney either by the Attorney General for the District of Columbia or by another high-level supervisor.

Subordinate agency – An agency under the direct administrative control of the Mayor. All Series 905 attorneys who provide legal services to a subordinate agency, whether or not located at the agency, are hired, employed, and supervised by the Office of the Attorney General for the District of Columbia, unless the Attorney General has delegated their supervision and control to the agency head.

Successful (line attorneys and non-supervisory attorneys under sections 3605 and 3607 of these rules only starting with the 2008-2009 rating period) – Performance generally meets and occasionally exceeds the level expected for attorneys of comparable experience without the need for ongoing supervision. The attorney produces quality work. An attorney will receive an overall “successful” rating when 60% or more of weighted categories fall within the “successful” level without a “fails expectations” rating in any element.

Successful (supervisors only under section 3606 of these rules starting with the 2008-2009 rating period) – Performance generally meets and occasionally exceeds the level expected for supervisors of comparable experience without the need for ongoing supervision. The supervisor produces quality work. Three (3) points are awarded to each competency starting with the 2008-2009 rating period rated as “successful” and to both each competency and each S.M.A.R.T. goal starting with the 2009-2010 rating period rated as “successful.” The overall rating of “successful” for the 2008-2009 rating period results from application of the formula, Overall Performance Rating = Sum of all Competency Ratings(each competency weighed equally)/Number of Competencies, where the total figure derived on the right side of this formula is in the range “2.9-3.5”. The overall rating of “successful” for the 2009-2010 rating period results from application of the formula, Overall Performance Rating = (Sum of all Competency Ratings/Number of Competencies x .4) + (Sum of all S.M.A.R.T. Goal Ratings/Number of S.M.A.R.T. Goals x .6), where the total figure derived on the right side of this formula is in the range “2.9-3.5”.

Supervisor – A person who 1) possesses the authority to recommend the hiring, promotion, transfer, discipline, or discharge of a subordinate attorney; 2) has the authority to direct, as well as assign work to a subordinate attorney; and 3) is responsible for the review of work, approval of leave, and evaluation of job performance of subordinate attorneys.

Training Director – The person designated by the Attorney General for the District of Columbia to oversee, arrange, and approve training, or an equivalent officer assigned by the Attorney General to supervise training.

Unit – The portion of an organization composed of all the attorneys under the direct supervision of a single supervisor.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments in writing not later than thirty (30) days after the date of publication of this notice in the D.C. Register. Comments should be filed with Wayne C. Witkowski, Esq., 1350 Pennsylvania Avenue, N.W. Room 417, Washington, D.C. 20004. Copies of these rules may be obtained at the address stated above.